IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 398

UNITED STATES OF AMERICA, Petitioner
v.
STATE OF ALABAMA, et al., Defendants

DEFENDANTS' PETITION FOR REHEARING AND MOTION TO RETAX COSTS

The defendants hereby petition the Court for a rehearing of this cause and reconsideration of the opinion and judgment rendered on May 16, 1960.

Also incorporated herein is a Motion to Retax the Costs.

MOTION TO RETAX COSTS

Under Rule 57 of the Supreme Court, where a judgment is vacated, costs shall be allowed petitioner, unless otherwise ordered by the court.

The Civil Rights Act of 1957, as amended, provides that in any proceeding such as the one here, the United States shall be liable for costs the same as a private person. 42 U. S. C., Section 1971 (c).

Without further order of this Court, it appears that the Defendants will be taxed with all the costs accruing to date in the case, even though the Defendants have been the successful parties to all the *litigated* controversy.

It is particularly unfair to tax Defendants with all the costs in view of the Petitioner's action in the Su-

preme Court which had the effect of affirming the dismissal of Defendants Rogers and Livingston. And, even regarding the Defendant State of Alabama, although it is still in the case, it appears unreasonable to tax it with the costs up to this point.

We do not believe the Writ of Certiorari would have ever been granted in this case had the only question been the right to sue the defendants Rogers and Livingston who had resigned before suit was brought. We regard the opinion and judgment of the Court as a partial vacation of the judgments of the Court of appeals and the District Court, for the United States is only authorized to proceed further against the defendant State of Alabama.

The defendants Rogers and Livingston are for all intents and purposes the successful parties as to their part of the case.

They should not be taxed with any costs, but the same should be taxed against the United States. The Civil Rights Act of 1960 has no bearing on the question of the legal right to sue them after they had resigned and had been removed from office.

As to the State of Alabama, it would also have been the successful party had it not been for an Act of Congress passed after two courts had ruled in its favor and just before the case was considered by this Court.

Under the circumstances we respectfully move the Court to make some equitable order relative to the taxation of costs.

It may be, and we are not clear on this point, that Rule 57(5) may govern, which says that "No costs shall be allowed in this Court either for or against the United States . . . except where specially authorized by statute and directed by the Court."

PETITION FOR REHEARING

On oral argument defendants' counsel stated the Memorandum of the United States had been served on Sunday afternoon before the argument the next day.

Although we had properly considered the 1960 Civil Rights Act, believing it unconstitutional as to the states, we had no time within which to properly evaluate the Memorandum.

The 1960 legislation amends 42 U. S. C. 1971(c) by adding certain language, a part of which is ". . . if, prior to the institution of such proceedings, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceedings may be instituted against the state."

First, the United States has contended in this very law suit that the defendant officials had not resigned or been relieved of office. Unless the judgments of the lower courts are vacated in part only, as we have said is the case, the United State must now reverse its position and agree with the defendant officials that they had effectively resigned, or been removed from office in order to come within the quoted part of said Section (c).

Second, since this case was argued, we call the Court's attention to the fact that two registrars have been appointed, a majority of the Board, in Macon County, Alabama, and have accepted their positions.

Third, the said Subsection (c) relates to parties who may be joined when the suit is instituted. It does not relate to a suit filed against a party who could not legally be sued when the suit was instituted. To say that a state may be sued now under the 1960 Act is entirely different from saying that a suit improperly filed may now be continued by virtue of the 1960 Act.

In short, it is our position that if any suit may now be maintained against a state, it must be through an entirely new suit. Such will avoid delay instead of further delay as claimed by the United States.

The Attorney General of the United States in explaining Section (c), as amended, said, "Inclusion of the provision in the Bill is merely to clarify the authority which exists under the 1957 Act, since a question has been raised concerning the authority in the case of *United States v. Alabama.* This provision merely reaffirms in explicit terms the authority granted by the 1957 Act." Statement dated March 28, 1960, before Senate Judiciary Committee, 86th Congress, Second Session.

At that very moment, as the Attorney General knew, the law was that a state could not be sued. It had been so decided by the District Court and the Court of Appeals. These decisions, until reversed, were binding upon him and the United States in the Fifth Circuit.

The Solicitor General then uses the testimony of Mr. Rogers to show the legislative history of the amendment to Subsection (c). It would have been more accurate to have stated the facts as they existed to the Committee and to have not argued the legislative history in view of the Judicial History to the contrary.

As to the State of Alabama, another indication that if suable at all, it must be by a new suit.

It is respectfully requested therefore that this application for rehearing be granted.

Respectfully submitted,

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I, MacDonald Gallion, as Attorney General of the State of Alabama, certify that on the ___ day of June, 1960, I mailed copies of the foregoing Petition for Rehearing and Motion to Retax Costs to the Solicitor General of the United States at the Department of Justice Building, Washington, D. C., and that said Petition and Motion are filed in good faith, and not for delay.

MacDONALD GALLION
Attorney General of Alabama